

Ms Perry



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: NASCO Aircraft Brake, Inc.

File: B-237860

Date: March 26, 1990

William A. Shook, Esq., Preston Gates Ellis and Rouvelas Meeds, for the protester.

Millard F. Pippin, Department of the Air Force, for the agency.

Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against the use of the Blue Ribbon Contractor Program is untimely where notice that the program was being used as an evaluation factor was contained in the request for best and final offers (BAFO) and the protest was not filed by the closing date for the receipt of BAFOs.

2. Request for best and final offers (BAFO) constitutes meaningful discussions where a proposal contains no technical uncertainties, and the BAFO request specifically ask offerors to provide additional information in a particular area, which was needed to improve an offerors proposal.

3. General Accounting Office will not question an agency's interpretation of its own program where protester has not shown that the interpretation is unreasonable.

DECISION

NASCO Aircraft Brake, Inc., protests the award of a contract to B.F. Goodrich Co. under request for proposals (RFP) No. F42600-89-R-21834, issued by the Department of the Air Force for 8,284 disc brakes, federal stock class (FSC) 1630, for the T-38 aircraft. NASCO alleges that the Air Force improperly evaluated its proposal with respect to the technical criterion of delivery performance.

We deny the protest in part and dismiss it in part.

C-48095/140961

The solicitation, issued June 2, 1989, indicated that NASCO and B.F. Goodrich were previously identified sources for these disc brakes. Both sources submitted initial proposals by the July 6 closing date. A request for best and final offers (BAFO), which requested additional documentation and certifications, was issued to both offerors on August 8. The BAFO request also informed the offerors how the delivery performance evaluation factor would be evaluated. The request stated that: "past performance in the areas of quality and delivery will be evaluated using data voluntarily provided by offerors on the instant acquisition and internal government data including 'F1' Air Logistics Center's Blue Ribbon Contractor List," also referred to as the Air Force Logistics Command (AFLC) Competition for Performance Program.

The Blue Ribbon Contractor List is composed of contractors who, through an application process, demonstrate dependable quality and delivery performance on Air Force spare parts contracts during the past year. The request for BAFOs specifically set forth the eligibility criteria for inclusion on the list. Failure to be a Blue Ribbon Contractor for this item, however, did not eliminate an offeror from the competition. Rather, the Blue Ribbon program clause states that "[o]fferors whose names are not listed for this FSC will still be considered for award. These offerors may voluntarily submit quality and delivery information relating to their performance on all AFLC contracts for this FSC during the past year." NASCO was telephoned on August 8 to advise it of the request for BAFOs, and to stress that additional clauses were included so that if any questions arose it should contact the contracting officer.

BAFOs were received from both offerors by the August 17 closing date, and neither took exception to the added clauses or information. NASCO, in its BAFO, offered a unit price of \$36.48 and did not include any additional information about its delivery performance. B.F. Goodrich, in its BAFO offered a unit price of \$37.73 and was on the Blue Ribbon Contractor list for this item. The contracting officer, having experience with both of these firms, concluded that they were both capable of producing acceptable disc brakes. The contracting officer's review of the delivery history of NASCO, based solely on government data as none had been supplied by NASCO, revealed that NASCO had an 88 percent on-time delivery rate, whereas to be considered a Blue Ribbon Contractor a firm must have at least a 90 percent on-time delivery rate. The contracting officer further found that B.F. Goodrich had a 100 percent on-time delivery rate. The contracting officer concluded that based

on the fact that B.F. Goodrich's price was only 3.4 percent higher and its delivery performance was superior, it was in the best interests of the government to award the contract to B.F. Goodrich, and did so on November 8. On November 22, NASCO filed a protest in our Office challenging both the Blue Ribbon Contracting Program and the evaluation of its delivery performance.

NASCO contends generally that the Blue Ribbon Contracting Program is arbitrary and capricious in its current operation, and does not reasonably select contractors that represent the best value or the lowest overall cost. NASCO raises 11 specific allegations against the operation of the program; however, it is not necessary to elaborate on each argument since they are untimely raised.

In procurements where proposals are requested, alleged improprieties which did not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1989). To be timely, therefore, NASCO was required to file its protest against the Blue Ribbon program prior to the date for receipt of BAFOs, rather than waiting, as it did, until after contract award.

NASCO requests that we consider its objections to the Blue Ribbon Program, even if we find them untimely, because its protest raises an issue which warrants consideration under the significant issue exception to the timeliness requirements under our Bid Protest Regulations 4 C.F.R. § 21.2(a)(2)(b). In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. The exception is limited to considering untimely protests only when we believe that the subject matter is of widespread importance or interest to the procurement community and involves a matter that has not been considered on the merits in previous decisions. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86.

NASCO's protest, which essentially questions the mechanics of the Air Force's calculation of the 90 percent on-time performance requirement under the program, does not meet this standard. We find nothing particularly unique about the program, which is simply an effort by the Air Force to formally implement certain performance considerations which an agency properly may consider in a negotiated procurement. Moreover, from the record it appears that NASCO's 83 day

delivery delinquency in performing the most recently completed contract which it had received for the item in question, according to agency records, provided the contracting officer with an independent basis, separate from the issue of membership in the Blue Ribbon program, to conclude that NASCO's performance was sufficiently inferior to Goodrich's--which has a 100 percent on-time delivery record for the item in question--to warrant the determination that Goodrich's technical superiority justified the payment of a 3.4 percent cost premium. Accordingly, since the issue presented regarding the Blue Ribbon program is not unique, and the agency had an alternate reasonable basis to award to Goodrich rather than NASCO, we decline to consider NASCO's untimely protest against the mechanics of the Blue Ribbon program under our significant issue exception.^{1/} See Space Vector Corp.--Request for Reconsideration, B-237986.4, Feb. 26, 1990, 90-1 CPD ¶ ____.

The remaining issue for our consideration concerns whether NASCO's delivery performance was properly evaluated. NASCO argues that the contracting officer used the wrong cut-off date for determining NASCO's performance. NASCO alleges that if the agency used the proper 1-year (365 day) period, NASCO's prior late deliveries would not have been included, and its perfect delivery schedule between July and September would have been included. NASCO also contends that because the agency evaluated its delivery performance of more than 1 year ago, this constitutes the application of an undisclosed evaluation criteria. Essentially, NASCO's contention is that the contracting officer did not include NASCO's delivery record between the closing date for receipt of initial proposals and the date for either BAFOs or award, and if he had done so then NASCO's delivery performance would be above the 90 percent threshold necessary. NASCO also disputes the method by which the agency arrived at NASCO's on-time delivery percentage.

In considering protests which challenge the technical evaluation of proposals, we do not conduct a de novo review or make an independent determination of their acceptability

^{1/} We also note that, to the extent that NASCO is protesting that its future efforts to compete for this item covered by the Blue Ribbon Contractor program will be prejudiced by the manner in which the agency determines membership in the program, NASCO's protest is academic. On November 11, 1989, subsequent to the award of the instant contract, NASCO applied for membership in the program and was approved on January 2, 1990, based on NASCO's recent improved on-time delivery record.

or relative merit, because that is the function of the contracting officer who is to exercise informed judgment and sound discretion. TIW Sys., Inc., B-222585.8, Feb. 10, 1987, 87-1 CPD ¶ 140. Our review is limited to examining whether the evaluation was fair and reasonable and consistent with stated evaluation criteria. Id. We will question a contracting officer's determination concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion and violation of procurement statutes or regulations. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, supra. The fact that the protester disagrees with the selecting official's conclusion does not itself render the evaluation unreasonable. TIW Sys., Inc., B-222585.8, supra.

Our review of the record reveals no inconsistencies between the stated evaluation criteria and the actual evaluation of the proposals. As previously noted, section M-21, which was included as part of the request for BAFOs, states: "Past performance in the areas of quality and delivery will be evaluated using data voluntarily provided by offerors on the instant acquisition and internal government data, including 'F1' Air Logistics Center's Blue Ribbon Contractor List." (Emphasis added.) Offerors are then directed to the explanation of the Blue Ribbon Contractor List which states that: "Offerors whose names are not listed on the Blue Ribbon Contractor List for this FSC will still be considered for award. These offerors may voluntarily submit quality and delivery information relating to their performance on all AFC contracts for this FSC during the past year."

NASCO did not submit any information in its BAFO which related to its delivery for this FSC. Therefore, even if the most current delivery data were more favorable to NASCO, failure to consider it was, in large part, the fault of NASCO, who was not on the Blue Ribbon list and, although specifically requested, failed to provide any data. In light of the clear language contained in the BAFO, request for voluntarily-furnished delivery performance data, we do not find the agency's reliance on the information it had in its file concerning NASCO's delivery performance, which ended as of July 17, to be unreasonable. Furthermore, we do not find the contracting officer's interpretation of the "past year" in the Blue Ribbon Contract Program, as meaning the previous 365-day period at the time of receipt of initial proposals, to be unreasonable.

NASCO also argues that award was made to other than the low offeror without conducting meaningful discussions. We note initially, that discussions occur when an offeror is given

the opportunity to revise or modify its proposal, or when information is requested to be provided by an offeror which is essential for determining the acceptability of its proposal. Louis Berger & Assoc., Inc., B-233694, Mar. 28, 1989, 89-1 CPD ¶ 347. Moreover, a request for BAFOs, in itself, constitutes meaningful discussions where a proposal contains no technical uncertainties. See Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 CPD ¶ 76.


To the extent that NASCO is alleging the agency failed to conduct meaningful discussions, we disagree. Agencies are required only to lead offerors into the areas of their proposals which require amplification. The Earth Technology Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113. Here, the BAFO request specifically asked for information concerning on-time delivery performance, the only technical criterion at issue, and the basis on which NASCO was lower-rated than Goodrich, and we find that in this context the discussions were adequate. Obviously, since discussions were conducted and BAFOs were requested, NASCO's assertion that award was improperly made on the basis of initial proposals to other than the low cost offeror simply is inaccurate.

NASCO next alleges that the contracting officer improperly used contract line items in calculating NASCO's on-time delivery performance, rather than using the actual quantity of items being purchased. The protester argues that this method fails to differentiate between the delivery of 1 unit in a line item and 1,000 units in a line item and, therefore, the delinquency rate for each is treated as if it were equal. NASCO contends this violates the Blue Ribbon program which states that delivery rate is calculated as the "total quantity delivered on-time divided by total quantity due."

Essentially, NASCO disagrees with the agency's interpretation of the term "quantity." We are not persuaded that the agency's determination of delinquency rates based on delivery per line item is unreasonable, since the goal of the program is to provide a preference to offerors with a demonstrated on-time delivery performance history of 90 percent or better for all contracts, and not just for

those with larger quantities. Furthermore, NASCO has not demonstrated how it was prejudiced by this difference in calculation, rather the protester merely argues that the method is incorrect.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel